

File

**BEFORE THE
STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS**

Application of Dorothy Tews for a)	
Permit to Construct a Channel That)	
Will Flow Into Lake Poygan, Town)	Case No. 3-LM-94-201
of Wolf River, Winnebago County,)	
Wisconsin)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND PERMIT

Dorothy Tews filed an application with the Department of Natural Resources for a permit pursuant to § 30.19, Stats., to place a culvert beneath Bluebill Lane to connect two waterways which flow into Lake Poygan. The Department of Natural Resources issued a notice which stated that unless written objection was made within thirty days after publication, the Department might issue a decision on the permit without a hearing. The Department received a timely objection.

On March 29, 1995, the Department filed a Request for Hearing with the Division of Hearings and Appeals. Pursuant to due notice a hearing was held on June 9, 1995 in Oshkosh, Wisconsin before Mark J. Kaiser, Administrative Law Judge.

In accordance with §§ 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

Dorothy Tews, Applicant
985 Babcock Street
Neenah, Wisconsin 54956-3676

Department of Natural Resources, by

Edwina Kavanaugh, Attorney
P. O. Box 7921
Madison, Wisconsin 53707-7921

Agnes Schrader, Objector, by

Keith Schrader
7895 County Highway MM
Larsen, Wisconsin 54947-9507

FINDINGS OF FACT

1. Dorothy Tews owns property on Bluebill Lane in the Village of Larsen, Winnebago County, Wisconsin. Dorothy Tews on behalf of herself and the eight other property owners on Bluebill Lane filed an application with the Department of Natural Resources for a permit pursuant to § 30.19, Stats., to place a culvert 36 inches in diameter beneath Bluebill Lane. The proposed project would be located in the SE 1/4 of the SW 1/4 of Section 25, Township 20 North, Range 14 East, Village of Larsen, Winnebago County, Wisconsin. The Department of Natural Resources and the applicant have fulfilled the procedural requirements of §§ 30.19 and 30.02, Stats., regarding notice of the public hearing.
2. A portion of Bluebill Lane runs in a north-south direction along the east shore of Lake Poygan. An unnamed, dredged channel runs parallel to this portion of Bluebill Lane. The channel is on the east side of Bluebill Lane. Bluebill Lane curves ninety degrees to the east at the north end of the dredged channel. The proposed culvert would be constructed under the portion of Bluebill Lane which runs east and west. The culvert will connect the dredged channel to a farm drainage ditch which runs parallel to the east-west portion of Bluebill Lane, along the north side of Bluebill Lane.
3. The purpose of the project is to divert water from the farm drainage ditch into the dredged channel. The dredged channel has become shallow and stagnant. The applicant and other property owners along this portion of Bluebill Lane hope by increasing the flow of water through the channel the water in the channel will be cleaner with less weed growth and siltation.
4. Both the dredged channel and the farm drainage ditch ultimately drain into Lake Poygan. Agnes Schrader owns property at the point where Bluebill Lane curves. The above described farm drainage ditch flows through her property. The son of Agnes Schrader, Keith Schrader, testified that she is concerned that if water is diverted from the farm drainage ditch to the dredged channel, there will not be enough flow to keep the water in the farm drainage ditch moving. The problems caused by stagnant water in the dredged channel will also occur in the farm drainage ditch.
5. The spoil material which will be removed for the construction of the proposed culvert will be disposed of on an upland site.

6. The proposed project will not result in any material injury to the rights of any riparian owners on Lake Poygan if constructed in accordance with the conditions set forth below. As described above Agnes Schrader is concerned that diverting water from the farm drainage ditch to the dredged channel will result in stagnant water in the portion of the farm drainage ditch which flows through her property. Obviously if water is diverted from the farm drainage ditch to the dredged channel, the amount of water flowing through the farm drainage ditch will be less.

However, based on the size, location and elevation of the culvert the reduction in the flow of water through the farm drainage ditch will not be sufficient to result in a material injury to the riparian rights of Agnes Schrader or any other riparian owners along Lake Poygan. It is more likely that the proposed culvert will not achieve the benefits hoped for by the applicant and other property owners along Bluebill Lane than it will have a significant adverse impact on the flow of water in the farm drainage ditch through the property of Agnes Schrader.

7. The proposed project will not injure any public rights or interests, including fish and game habitat if constructed in accordance with the conditions set forth below.

8. The proposed project will not cause any environmental pollution as the phrase "environmental pollution" is defined in § 144.01(3), Stats., if constructed in accordance with the conditions set forth below.

CONCLUSIONS OF LAW

1. The proposed project as described in the above Findings of Fact constitutes an enlargement of a navigable body of water for which a permit is required pursuant to § 30.19(1), Stats.

2. Pursuant to § NR 150.03(8)(f)2, Wis. Adm. Code, the proposed project is a type IV action. Type IV actions are exempt from the requirements of chapter NR 150, Wis. Adm. Code, and do not require the preparation of an environmental assessment or an environmental impact statement.

3. Pursuant to §§ 227.43(1)(b) and 30.19, Stats., the Division of Hearings and Appeals has the authority to issue the following permit subject to the conditions specified.

PERMIT

THERE HEREBY DOES ISSUE AND IS GRANTED to the applicant, a permit under § 30.19(1), Stats., for the construction of a culvert as described in the Findings of Fact, subject; however, to the conditions that:

1. The permittee shall obtain any authority required under local zoning ordinances and from the U.S. Army Corps of Engineers.
2. The permittee shall notify the local Water Management Specialist in writing not less than 5 working days before starting construction and again not more than 5 days after completion of the project.
3. A copy of the permit shall be kept at the project site and available at all times during construction and until stabilization has been accomplished.
4. The permittee shall waive any objection to the free and unlimited inspection of the premises, site, or facility at any time by any employee of the Department of Natural Resources for the purpose of investigating the construction, operation and maintenance of the project.
5. A silt curtain must be placed in the water across all three channels during construction.
6. Erosion prevention must be used during and after construction until all disturbed areas are stabilized.
7. Rock riprap must be placed on both ends of the culvert along both shorelines.
8. The excavated material must be placed on an upland site. The deposition of spoils in a wetland is prohibited.
9. The culvert shall be placed at the same level (elevation) as the culvert currently located under Agnes Schrader's driveway.
10. The permit shall expire on September 1, 1997, if construction of the proposed culvert is not completed before such date.

This permit shall not be construed to authorize or include any work or development other than that specifically described in the Findings of Fact. Acceptance of this permit shall be deemed acceptance of all conditions specified.

Dated at Madison, Wisconsin on July 10, 1995.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By Mark Kaiser
MARK J. KAISER
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.